

1 Joshua B. Swigart, Esq. (SBN: 225557)  
 josh@westcoastlitigation.com  
 2 Tiffany G. Jensen, Esq. (SBN: 256842)  
 tiffany@westcoastlitigation.com  
 3 **Hyde & Swigart**  
 4 411 Camino Del Rio South, Suite 301  
 San Diego, CA 92108-3551  
 5 Telephone: (619) 233-7770  
 6 Facsimile: (619) 297-1022

7 Attorneys for Plaintiff  
 8  
 9  
 10

11 **UNITED STATES DISTRICT COURT**  
 12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 **MERCY MESIANO**

14 Plaintiff,

15 v.

16 **ERICA L. BRACHFELD AND**  
 17 **LAW OFFICES OF BRACHFELD**  
 18 **& ASSOCIATES, PC**  
 19  
 20

Case Number:

21 **'09CV 1046 MMA BLM**  
**Complaint For Damages**

**Jury Trial Demanded**

22 **INTRODUCTION**

- 23 1. The United States Congress has found abundant evidence of the use of  
 24 abusive, deceptive, and unfair debt collection practices by many debt  
 25 collectors, and has determined that abusive debt collection practices  
 26 contribute to the number of personal bankruptcies, to marital instability, to the  
 27 loss of jobs, and to invasions of individual privacy. Congress wrote the Fair  
 28 Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (hereinafter  
 "FDCPA"), to eliminate abusive debt collection practices by debt collectors,

**FILED**

**09 MAY 13 PM 4:28**

CLERK, U.S. DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

HYDE & SWIGART  
 San Diego, California

**ORIGINAL**

1 to insure that those debt collectors who refrain from using abusive debt  
2 collection practices are not competitively disadvantaged, and to promote  
3 consistent State action to protect consumers against debt collection abuses.

4 2. The California legislature has determined that the banking and credit system  
5 and grantors of credit to consumers are dependent upon the collection of just  
6 and owing debts and that unfair or deceptive collection practices undermine  
7 the public confidence that is essential to the continued functioning of the  
8 banking and credit system and sound extensions of credit to consumers. The  
9 Legislature has further determined that there is a need to ensure that debt  
10 collectors exercise this responsibility with fairness, honesty and due regard  
11 for the debtor's rights and that debt collectors must be prohibited from  
12 engaging in unfair or deceptive acts or practices.

13 3. Mercy Mesiano, (Plaintiff), through Plaintiff's attorneys, brings this action to  
14 challenge the actions of Erica L. Brachfeld and the Law Offices of Brachfeld  
15 & Associates, PC, ("Defendants"), with regard to attempts by Defendants to  
16 unlawfully and abusively collect a debt allegedly owed by Plaintiff, and this  
17 conduct caused Plaintiff damages.

18 4. Plaintiff makes these allegations on information and belief, with the exception  
19 of those allegations that pertain to a plaintiff, or to a plaintiff's counsel, which  
20 Plaintiff alleges on personal knowledge.

21 5. Unless otherwise stated, Plaintiff alleges that any violations by Defendants  
22 were knowing and intentional, and that Defendants did not maintain  
23 procedures reasonably adapted to avoid any such violation.

#### 24 JURISDICTION AND VENUE

25 6. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1331, 15 U.S.C. §  
26 1692(k), and 28 U.S.C. § 1367 for supplemental state claims.

27 7. This action arises out of Defendants' violations of the Fair Debt Collection  
28 Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA") and the Rosenthal Fair

1 Debt Collection Practices Act, California Civil Code §§ 1788-1788.32  
2 ("RFDCPA").

3 8. Because Defendants do business within the State of California, personal  
4 jurisdiction is established.

5 9. Venue is proper pursuant to 28 U.S.C. § 1391.

6 **PARTIES**

7 10. Plaintiff is a natural person who resides in the State of California.

8 11. Defendants are located in the the State of California.

9 12. Plaintiff is obligated or allegedly obligated to pay a debt, and is a "consumer"  
10 as that term is defined by 15 U.S.C. § 1692a(3).

11 13. Defendants are persons who use an instrumentality of interstate commerce or  
12 the mails in a business the principal purpose of which is the collection of  
13 debts, or who regularly collect or attempt to collect, directly or indirectly,  
14 debts owed or due or asserted to be owed or due another and are therefore  
15 debt collectors as that phrase is defined by 15 U.S.C. § 1692a(6).

16 14. Plaintiff is a natural person from whom a debt collector sought to collect a  
17 consumer debt which was due and owing or alleged to be due and owing from  
18 Plaintiff, and is a "debtor" as that term is defined by California Civil Code §  
19 1788.2(h).

20 15. Defendants, in the ordinary course of business, regularly, on behalf of  
21 themselves, or others, engage in debt collection as that term is defined by  
22 California Civil Code § 1788.2(b), are therefore debt collectors as that term is  
23 defined by California Civil Code § 1788.2(c).

24 16. This case involves money, property or their equivalent, due or owing or  
25 alleged to be due or owing from a natural person by reason of a consumer  
26 credit transaction. As such, this action arises out of a consumer debt and  
27 "consumer credit" as those terms are defined by Cal. Civ. Code § 1788.2(f).

28 //

HYDE & SWIGART  
San Diego, California

**FACTUAL ALLEGATIONS**

17. At all times relevant to this matter, Plaintiff was an individual residing within the State of California.
18. At all times relevant, Defendants conducted business within the State of California.
19. Sometime before September 11, 2008, Plaintiff is alleged to have incurred certain financial obligations.
20. These financial obligations were primarily for personal, family or household purposes and are therefore a "debt" as that term is defined by 15 U.S.C. §1692a(5).
21. These alleged obligations were money, property, or their equivalent, which is due or owing, or alleged to be due or owing, from a natural person to another person and are therefore a "debt" as that term is defined by California Civil Code §1788.2(d), and a "consumer debt" as that term is defined by California Civil Code §1788.2(f).
22. Sometime thereafter, but before September 11, 2008, Plaintiff allegedly fell behind in the payments allegedly owed on the alleged debt.
23. Subsequently, but before September 11, 2008, the alleged debt was assigned, placed, or otherwise transferred, to Defendants for collection.
24. On or about September 11, 2008, Defendants filed a lawsuit against Plaintiff in the Superior Court for the State of California in San Diego, case number 37-2008-00091462-CL-CL-CTL.
25. Plaintiff is informed and believes, and thereon alleges that Defendants initiated this current action well outside the statute of limitations allowed by California Law.
26. Through this conduct, Defendant was collecting an amount (including any interest, fee, charge, or expense incidental to the principal obligation) when

such amount was not expressly authorized by the agreement creating the debt or permitted by law. Consequently, Defendant violated 15 U.S.C. § 1692f(1).

27. Plaintiff is informed and believes, and thereon alleges that the lawsuit filed by defendant was initiated without any reasonable inquiry into the facts or merits of the allegation. As such this action by defendant violated 15 U.S.C. §§ 1692e, 1692e10, and 1692f.

28. Because this violated certain portions of the federal Fair Debt Collection Practices Act as these portions are incorporated by reference in the Rosenthal Fair Debt Collection Practices Act, though California Civil Code § 1788.17, this conduct or omission violated Cal. Civ. Code § 1788.17, this conduct or omission violated Cal. Civ. Code § 1788.17.

## CAUSES OF ACTION

### COUNT I

#### VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

#### 15 U.S.C. §§ 1692 ET SEQ.

29. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

30. The foregoing acts and omissions constitute numerous and multiple violations of the FDCPA, including but not limited to each and every one of the above-cited provisions of the FDCPA, 15 U.S.C. § 1692 et seq.

31. As a result of each and every violation of the FDCPA, Plaintiff is entitled to any actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in an amount up to \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A); and, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3) from each and every defendant, jointly and severally.

//

//

//

**COUNT II****VIOLATIONS OF THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT****CAL. CIV. CODE §§ 1788-1788.32**

32. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

33. The foregoing acts and omissions constitute numerous and multiple violations of the RFDCPA.

34. As a result of each and every violation of the RFDCPA, Plaintiff is entitled to any actual damages pursuant to Cal. Civ. Code § 1788.30(a); statutory damages for a knowing or willful violation in the amount up to \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b); and reasonable attorney's fees and costs pursuant to Cal. Civ. Code § 1788.30(c) from each and every defendant, jointly and severally.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays that judgment be entered against Defendants, and Plaintiff be awarded damages from each and every defendant, as follows:

**COUNT I****FAIR DEBT COLLECTION PRACTICES ACT****15 U.S.C. §§ 1692 ET SEQ.**

35. An award of actual damages pursuant to 15 U.S.C. § 1692k(a)(1);

36. An award of statutory damages of \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A);

37. An award of costs of litigation and reasonable attorney's fees, pursuant to 15 U.S.C. § 1692k(a)(3).

//

//

//

//

**COUNT II**

**ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT**

**CAL. CIV. CODE §§ 1788-1788.32**

38. An award of actual damages pursuant to California Civil Code § 1788.30(a);
39. An award of statutory damages of \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b);
40. An award of costs of litigation and reasonable attorney's fees, pursuant to Cal. Civ. Code § 1788.30(c).

**TRIAL BY JURY**

41. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Date: 5/8/09

**Hyde & Swigart**

By: Joshua B. Swigart  
Attorneys for the Plaintiff

**HYDE & SWIGART**  
San Diego, California



## CIVIL COVER SHEET

JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating a civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## (a) PLAINTIFFS

Mercy Mesiano

(b) County of Residence of First Listed Plaintiff California San Diego  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Lyde &amp; Swigart

11 Camino Del Rio South Suite 301, San Diego, CA 92108

619.233.7770

## DEFENDANTS

Erica L. Brachfeld And Law Offices Of Brachfeld &amp; Associates, PC

County of Residence of First Listed Defendant California

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'09 CV 1046

MMA BLM

## I. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## V. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

## VI. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 1692 et seq.

Brief description of cause:

FDCPA

## VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$  
75,000CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## IX. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

5/8/09

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

ORIGINAL



Court Name: USDC California Southern  
Division: 3  
Receipt Number: CAS000776  
Cashier ID: sramirez  
Transaction Date: 05/13/2009  
Payer Name: HYDE AND SWIGART

---

CIVIL FILING FEE  
For: MESIANO V. BRACHFELD  
Case/Party: D-CAS-3-09-CV-001046-001  
Amount: \$350.00

---

CHECK  
Check/Money Order Num: 3083  
Amt Tendered: \$350.00

---

Total Due: \$350.00  
Total Tendered: \$350.00  
Change Amt: \$0.00

There will be a fee of \$45.00  
charged for any returned check.